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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LINDA KATHERINE WOO,

Defendant and Appellant.

A127153

(San Francisco County  
Super. Ct. No. 201242)

Defendant Linda Katherine Woo tried to kill herself and her two young children with carbon monoxide poisoning. One child died, but Woo and the other child survived. A jury convicted her of murder and attempted murder, and found that she was legally sane at the time of the crimes. She was sentenced to 25 years to life in prison, with possibility of parole. Woo contends that the judgment must be reversed because the jury was misinstructed on her insanity defense. We disagree and affirm.

**I. BACKGROUND**

**A. Facts**

Woo married Gavin Murphy in 1993. They had a son, C., born in September 2001, and a daughter, Olive Murphy, born on January 8, 2003. They owned a house in San Francisco and a vacation home in Miwok. Gavin worked as an engineer and Woo worked as a rate analyst for PG&E. Woo began working for PG&E in 1995, continued working there part-time after C. was born, and volunteered at the nursery school the children attended. In early 2005, Woo told Gavin that she wanted a divorce. At the time she was involved in a love affair with Eric Embry.

Embry was a photographer who met Woo in November 2000, when he traveled to San Francisco from his home in Tennessee to participate in a photo shoot at PG&E. One night during the week-long photo shoot they had sex in a motel. Embry gave Woo a mailing address in Tennessee, and she tracked down his phone number and email address. She telephoned him, and sent him letters and emails. Embry's sister moved to San Francisco in January 2001, and he visited her in late September 2001, a few weeks after C.'s birth. Woo brought C. along when she went to see Embry at a bar in the city during this visit. She and Embry had sex again when he returned to San Francisco for a visit in July 2002. In December 2003, Embry moved to San Francisco to be close to his sister and to further his photography career. When he told Woo about the move, she said, "Oh, no," "I wish you wouldn't do that," because she felt her attraction to him would jeopardize her marriage.

Embry testified that he and Woo carried on their affair throughout 2004. They called and emailed each other every day and got together for two or three hours three to five days a week. By February 2004 they were "madly in love." They knew that the affair was wrong but did not have the will to end it. In early 2005, Embry felt that the affair had "obviously gone too far" when he learned that Woo and Gavin were getting divorced. He had had no intention of marrying Woo, and had made clear to her at the beginning of the affair that he did not want to be a parent. Embry broke off the affair in March 2005.

That month, Woo began therapy with psychologist Daryl Goldman, and continued seeing Goldman until she attempted suicide. Woo told Goldman that Embry was refusing to see her and that she was contemplating suicide. She felt closer to Embry than she had to any other person in her life. She could not stop driving by his home after the break up. She guessed the code for his voice mail, and was ashamed because she could not stop listening to his messages. Woo reported loss of weight, insomnia, fatigue, and difficulty concentrating. Goldman diagnosed her with Major Depressive Disorder (MDD), single episode, moderate, and referred her to a psychiatrist who prescribed the medication

Lexapro, which she stopped taking after five months. By May 3, 2005, Goldman believed that Woo's depression was resolving.

Woo confided in her friend Jeanette Woo (no relation; hereafter Jeanette) about her affair with Embry, and told Jeanette that she was devastated by their breakup. Jeanette testified that a couple of months after the breakup Woo "was finally coming around. She was regaining some . . . weight and some . . . energy and then she ran into [Embry]."

Embry testified that after a chance encounter in early May, he and Woo resumed seeing each other as before. Goldman noted that Woo's mood improved over the summer after she started seeing Embry again. Gavin moved out of Woo's home in June, and started dating Leila Easa in July. Embry testified that Woo's "attitude" during this time "was that her marriage was over and so I could be a legitimate part of her life." But Embry told her that they had no long-term future and he did not want their affair to be publicly revealed. Woo told Goldman that Embry was "very push-pull. That he would resist spending time with her, getting close, and then they would spend incredible time together." Goldman said that Woo's moods and suicidal ideations fluctuated with these cycles. Goldman likened Embry to a slot machine Woo could not walk away from because he sometimes provided the deep emotion that was missing in her marriage.

Goldman testified that, except for a brief period of improvement in January 2006, Woo's depression worsened after September 2005. At Olive's birthday party in January, Gavin told Woo that he suspected she had been having an affair. Goldman said that Woo "had more hope through parts of January once everything was out about [Embry]. But then it was clear by the end of January that it wasn't making a difference with [him]." Embry called Woo on March 1, 2006, intending to break up with her and never speak to her again. She flooded him with calls for a week, at one point calling his cell phone 40 times in a row, begging him not to abandon her. Embry did not answer the calls.

In Goldman's opinion, Woo was then suffering from MDD. Her depression was so severe that, throughout the month of March, Goldman considered having her involuntarily committed under Welfare and Institutions Code section 5150 as a danger to

herself. Goldman believed Woo when she said that she would not commit suicide because doing so would hurt C. and Olive, but she was sufficiently concerned about the risk of suicide that she urged Woo to have people around her when she was not with her children. Goldman believed Woo when she said the children “were the purpose in her life,” and she would not do anything to harm them. Woo looked and sounded terrible when Goldman last saw her on March 23, but Woo insisted that she was okay when they last spoke on the phone on March 28.

Woo’s activities, appearance, and state of mind in March were detailed by her sister Debbie and a host of her friends: Thomas Kauth, a grammar school classmate; Kauth’s wife, Lisa Velarde; Tiffany Silva, a high school classmate; Julie Chao, a college classmate; Jeannette, a coworker at PG&E; Melita Juresa-McDonald, a woman Woo met in the 1990’s; Julie Grigoryan, a parent of children who attended C. and Olive’s nursery school; and Rebecca Clark, Jeanine Donohue, Annie Murphy, and Patricia Campbell, women Woo met playing on a Gaelic football team. Woo and Gavin had many friends, and were the organizers of events in their social circle.

Jeanette testified that Woo had “changed dramatically” over the year leading up to her suicide attempt. Silva and Murphy described Woo as a “completely different person,” just “a shell” of the “upbeat,” “happy, fun-loving” person she had been. Donohue and Campbell testified that Woo had been “the life of the party,” the “bubbiest, liveliest . . . person to be around . . . .” To Juresa-McDonald and Clark, she had been “larger than life.” But by March 2006 she looked to Juresa-McDonald like a “wet chicken,” as if “all her ships had sunk” and she did not know how to swim.

Kauth testified that Woo had lost a shocking amount of weight by March 2006, and Juresa-McDonald described her as “really skinny” by that point. Donohue testified that Woo had been “a phenomenal athlete,” and had qualified for a team that played in the Gaelic football world championships in Ireland. But she had gone, in Clark’s words, from being a “big presence” to “sort of concave.” Grigoryan likewise described Woo as “sunken,” like her body was “caving in.” It seemed to Clark that when Woo’s relationship with Embry ended, “he took most of her with him.”

When Silva talked with Woo on the phone on March 5, she told Silva that Embry had broken up with her, and cried for the first time Silva could remember. Woo told friends in a group email that week that she did not want to be alone and asked for company. Velarde testified that at the time Woo had custody of her children three days a week, and every other weekend. Velarde, Clark, Chao, and Juresa-McDonald agreed that they would try to be with Woo on the days she was alone.

Woo also asked for help in caring for the children. Woo told Velarde that she was having trouble sleeping, and asked Velarde to come over and help with the children on at least five or six mornings in late February and March. Kauth found it “shocking” that Woo needed assistance with the children because she had never needed help with them before.

By all accounts, as Clark testified, Woo was “an amazing mother.” When it came to the kids, Silva testified that Woo was “always thinking of activities for them to do,” “constantly obsessed about what they ate . . . and worrying about their safety [and] comfort.” She made the children’s Halloween costumes, and kept a journal about the children on her computer. “You could just see the joy,” Donohue testified, “that she had in being with them.” Juresa-McDonald testified that Woo inspired her to become a mother, and that she always said, “if I get half as good as [Woo], I would be a good mother.” Clark recalled that Woo said that she could recover if Gavin died, but would never get over losing her children.

Gavin testified that Woo “adored those kids,” and that he could not imagine her hurting them. Embry testified under cross-examination that, prior to March 29, 2006, Woo never mentioned to him any plan to harm her children. In fact, he thought she lived for her kids, and even when everything was crumbling around her, her priority was always her kids. Clark testified that no one worried about the children when Woo talked the about suicide in March. Woo told Chao the “two things that are stopping me from committing suicide [are] [C.] and Olive.”

When Woo told Gavin in early March that she was contemplating suicide, he contacted her sisters, Debbie and Cindi, who flew from Seattle to visit Woo over the

weekend of March 11-12. Debbie testified that Woo was sobbing because she was not seeing Embry, and Debbie had not seen Woo cry since childhood.

Woo met Gavin's girlfriend Easa for the first time on March 18, at a fundraiser for C. and Olive's nursery school. Gavin had delayed bringing Easa into the children's lives, but told Woo that he was planning to take Easa and the children to the Miwok home on the weekend of April 1.

Woo told Goldman that she was concerned that Easa would take over her role as the children's mother. Velarde thought that Woo "was concerned about [Easa] and Gavin taking over some parenting duties that [Woo] was doing. [Woo] wanted to be the sole, . . . important parent to the children." Velarde thought Easa "was great with the kids," and that "it would be helpful [to have] another person to help out with the parenting . . . but [Woo] didn't see it that way." Woo was "concerned about anyone having influence on her children" as a mother. She had always referred to the children as "my kids," not "our kids." She wanted to be in control of the children and worried about losing that control.

Woo stopped by Embry's home on March 18 on the way to the fundraiser where she met Easa. He was angry when he saw her and told her that she could not come in. She apologized for coming over uninvited and left. Woo was "extremely despondent" when Silva saw her the next day. Silva testified that Woo did not "smile[]" at all that day. She was having a hard time focusing on the kids. . . . Her body was slumped. She was nervous." David Wolber, a computer science professor who examined the hard drive of Woo's computer, testified that by this point Woo was researching how to commit suicide on the internet under topics such as "suicide carbon monoxide" and "[i]ndoor use of charcoal grill."

Gavin and Chao went to Woo's home on March 20 and tried to persuade her to check herself into a hospital. Gavin told her that she could not kill herself because of the pain it would cause their children. In an interview after the attempted suicide, Woo said that she agreed with Gavin when he said that her suicide "would absolutely ruin [the children's] lives," and "then it dawned on me that I could take them with me and that would spare them the pain."

Around March 21 or 22, Woo resumed calling Embry, saying that she was not doing well and asking for help. She told him in a March 23 email that he was the only one who could help her, and added: “I realize it is emotional blackmail . . . but it is the plain truth from where I am right now.” Embry called her back on March 24 because she started mentioning suicide. He told her that if she was serious, he would call Gavin and her sisters to get her help. She replied, “Don’t call them. I’m not. . . . They will take my children away.” When she told Embry she was not serious about committing suicide, he got angry and told her not to call him anymore. He thought that Woo’s talk of suicide was “the next installment in however it was that she was going to keep me around.”

Gavin testified that Woo looked “like a zombie” when he went to pick up the children on March 24. She was “lifeless,” “just not there,” and he had never seen her like that before. When Velarde was at her house that day, Woo called a suicide hotline. She told Velarde that the call was not helpful.

Woo went to Napa on March 25 with a group of friends to celebrate Clark’s birthday. Kauth and Velarde testified that Woo was in good spirits that day, and Kauth said the group felt she was doing better. Juresa-McDonald described Woo as “vivacious” on the Napa outing, after having been “a shell of herself” the night before.

Embry was concerned about the desperate messages Woo had been leaving on his phone and agreed to see her on the night of March 26. They went to a bar, where Woo seemed calm and happy, and talked lightly about her depression. Embry testified that “she was not the desperate pleading person that she had been on the phone and that made me angry.” They had an argument, and the evening ended with Woo pounding on the door of Embry’s home – acting out in a way he had not seen before.

Embry spoke to Woo on March 28, and told her he would call her that night. After leaving work he tried to send her a text message to let her know he could not make the call, but later discovered that the message had not gone through. Around 10:00 p.m. he retrieved an email from Woo that said: “I know that you are gone because you didn’t call tonight and that’s okay. I know that you are leaving and it’s okay.” He thought “she ha[d] finally let go.” Woo called Gavin at 12:34 a.m. on March 29, and left a message

that said, “Gavin, I’m just up feeling very sentimental or confused. Goodbye.” He considered the message as a hopeful sign that the anger Woo had been directing toward him was lessening.

The night of March 28, Embry parked his car on the street near his house. When he got up to go to work the next morning, his car was gone and Woo’s car was parked in its place. Woo had a key to Embry’s car and he thought she must have taken it. He called a co-worker for a ride to work and had the driver stop at Woo’s home so he could confirm that she had his car. When they got to her house, Embry opened a mail slot to the garage and saw his car inside. Given what had transpired with Woo, he feared that the engine would be running, but it was not.

Embry entered the house through a back bedroom door, went to the garage, and found Woo, C., and Olive lying on the lowered back seat of the car. When he opened the rear driver’s side door, Woo and C. stirred, and made noises as if they were starting to wake up. He did not smell anything unusual in the garage and did not look in the front seat. He did not wake Woo and take his car back because he did not want to fight with Woo in front of C. He was not worried about Woo committing suicide in the presence of her children, and thought she was pulling a stunt in order to prolong their relationship. He spent two or three minutes at the house and went to work.

Woo was scheduled to work at the nursery school at 1:00 that afternoon, and the school called Gavin at 1:15 when she and the children did not appear. After Gavin called Woo’s home and got no answer, he called Kauth and asked him to check on the situation. Kauth and Velarde went to Woo’s house and found her and the children in the car in the garage. A hibachi grill with burned out coals was on the passenger side of the front seat. Woo and C. were alive, but Olive had died from carbon monoxide poisoning.

Woo left the following note, dated March 23, for Embry on the dashboard of the car: “Thank you for trying to stop me. The only thing you could have said was that you’d be there for me and love me and help me through every step of the way, but that would have been a lie and you couldn’t do it, I know. But you tried and I think you tried more than anyone else. Clearly, I am not thinking straight. Everyone will think I’m a



monster. But understand that I know that losing their mother would be more than two children of their ages could handle and I don't want them to go through that awful pain. It would ruin their lives forever and I don't know what would become of them. They would have terrible lives. It was a choice between their pain and everyone else's pain. I'm sorry, but I had to choose them. It may be a really fucked up way of thinking, but that is what I was thinking. I know the pain and awfulness this will cause everyone, especially Gavin and my mother. I am very sorry for that. I really do feel like I cannot go on with this life. It is completely selfish, I know. I'm so tired and worn out and detached from life. I said a lot of things to you last night, so I don't need to say them all again. I do this knowing you love me, so thank you. These last hours are very scary for me and I feel very alone but I think of you last night holding me and I feel better. I would like very much if you would sing at my memorial service there might be for me and my kids."

Woo left the following note in her kitchen for Gavin: "I am sorry for your pain and your suffering, and also for my mother's and everyone else's. In the end, I chose the children over all of you. I cannot let them go through the pain of losing me and then struggling to live a normal life knowing their mother killed herself and left them. It's too much for them. I know I am being selfish. I don't know how to function anymore. I love my children more than anything. And you know I don't believe in God. I know you and everyone will think I am a monster. I am robbing them of their lives, yes, but I am also saving them from so much sorrow and grief. I am so sorry. Oh, Gavin, I know you will miss them everyday for the rest of your life. I'm not going to ask you to forgive me because I don't deserve it. I know Leila and your mother will help you get through . . . this. I am so sorry this is happening."

Velarde called 9-1-1 and Woo was taken to San Francisco General Hospital, where she spent over two months in the jail psychiatric ward. She was treated during her stay by Dr. Gilbert Villela, who described her as "probably one of the most severely depressed patients I have encountered in my clinical experience." She was placed on a suicide watch for longer than any other patient Villela could recall. Woo was described

in the hospital's exit report as suffering from MDD (the Axis I, primary diagnosis) and having narcissistic traits (Axis II).

## **B. Expert Opinions**

Six expert witnesses testified in the case: three retained by the defense – psychiatrists Stephen Hall and Jeffrey Gould, and psychologist Patricia Perez-Arce; two appointed by the court – psychiatrists Roland Levy and David Kessler; and one retained by the prosecution – psychiatrist David Kan. They all essentially agreed that Woo was suffering from MDD in March 2006. Kan testified that Woo suffered from “Depressive Disorder, Not Otherwise Specified,” and exhibited narcissistic and borderline traits, but conceded that she displayed the symptoms for a “Major Depressive Episode,” and that “the definition of [MDD] is having a Major Depressive Episode.”<sup>1</sup>

The experts also agreed that Woo understood the nature and quality of her acts and that killing her children was legally wrong. She understood what she was doing, and left behind a note saying that she wanted the suicide to succeed because she would rather die than go to prison. The experts had divergent views of whether Woo understood that killing her children was also morally wrong.

Hall testified that Woo's thinking was severely distorted by her MDD. MDD creates “an overriding pessimism” that can produce poor judgment. The distortions in Woo's case included her belief that her children would be better off dead than having to

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<sup>1</sup> “MDD” is defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) (DSM-IV) to consist of one or more “Major Depressive Episodes.” (DSM-IV at pp. 327, 344-345.) A Major Depressive Episode occurs when five or more of the following nine symptoms, at least one of which is either the first or second symptom, is present during a two-week period: (1) depressed mood for most of nearly every day; (2) markedly diminished interest or pleasure in all, or almost all, activities for most of nearly every day; (3) significant weight loss or gain; (4) insomnia or hypersomnia nearly every day; (5) psychomotor agitation or retardation nearly every day; (6) fatigue or loss of energy nearly every day; (7) feelings of worthlessness or excessive or inappropriate guilt nearly every day; (8) diminished ability to think or concentrate, or indecisiveness, nearly every day; and (9) recurrent thoughts of death, recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide. (*Id.* at p. 327.)

live without her after her suicide, which led Woo to believe that killing the children was “morally right.” Her thinking was also distorted insofar as she saw no hope for a meaningful life without Embry, which caused her mood to fluctuate with his availability. Woo told Hall that she would not have gone through with the suicide if Embry had showed up that night. She knew that killing the children would hurt many people, and that killing in general was condemned by society. But knowing that people would condemn her actions did not mean she appreciated that her actions were morally wrong.

Gould offered three perspectives on whether Woo believed what she was doing was morally right. First, Gould considered whether Woo understood “the moral values of society,” and knew that others would disapprove of her actions. Gould believed Woo was aware that she was “behaving in ways that were incongruous with our society’s . . . . moral standard,” and “knew that others would disapprove and would be hurt by this . . . .”

Second, Gould explored whether Woo believed that killing her children was necessary to protect them from pain. Gould thought Woo had acted, consistent with “generally accepted standards of moral obligation,” to protect her children from suffering. Gould rejected other possible motives for Woo’s action, such as preventing Easa from parenting the children or a desire to hurt Embry.

Third, Gould addressed whether Woo believed that another “morally upstanding person,” knowing what she knew at the time, would have taken the same actions. His answer was “yes.” Gould interviewed Woo over the course of 18 hours in jail, and at one point they had the following exchange: “[Q.] Do you . . . think if someone else was in your exact position there, another person feeling your depression leading up to this and your suicidal feelings and your thoughts about your kids, if someone else was in your situation would they have done the same thing.” [A.] Yeah. [Q.] Why? [A.] Because it was just the only option in that place that I was. It was such a dark place. It was just the only thing possible to do. [Q.] Suicide or suicide with the children? . . . [A.] Suicide for me and as a result with the kids, because of my love for them.”

The other defense expert, Perez-Arce, administered intelligence and personality tests to Woo. Perez-Arce found that Woo “function[ed] at a very high level cognitively,”

better than 92 percent of the population. Although Woo's performance was at least average on all tests, the tests showed that she could not function well under emotional stress. Perez-Arce's specialty is child development, and she recounted facets of Woo's childhood that contributed to making her "an active outwardly directed," but inwardly lonely, person. She agreed with Hall that Woo's thinking was distorted by MDD, and testified that Woo was "out of touch with reality" when she decided to kill her children. The MDD and the distorted thinking it produced was "the main factor in [Woo] believing that . . . killing her children along with herself would be an act of protection and love." But Perez-Arce wrote in her report: "The intensity of this new type of love [for Embry] trumped her self-protective and family-protective tendencies."

Court-appointed expert Levy testified that Woo "decided that if she couldn't have [Embry], she was going to kill herself." Woo "didn't really want to die, but if she couldn't have him, then there was nothing left and she had to die." He wrote in his report that "[d]ue to her severe depression, she convinced herself it was actually in the best interest of the children for them to die and not have to face life knowing that their mother was suicidal." In Levy's view, Woo's "problem in relationship to the children . . . was twofold: One was she didn't want them to suffer without her. And the other was she didn't want them to go on without her where they might end up in a new family and a new mother." When Levy was asked whether Woo was aware that her actions were morally wrong, he answered that she was "aware of that in terms of society at large, not in terms of her own belief." Woo "convinced herself" that it was in the children's best interest "for them to die and not face life without their mother."

Court-appointed expert Kessler found that MDD distorted Woo's thinking into a belief that killing her children was the right thing to do to save them from pain. He nevertheless opined that she was capable of distinguishing moral right from wrong at the time of her attempted suicide.

Prosecution expert Kan opined that Woo knew that killing the children was morally wrong, and that she was legally sane when the crimes occurred. Kan believed that Woo's behavior was driven less by her depressive disorder than by her narcissistic

traits, such as her belief that she was the only one who could adequately parent her children, and her borderline traits, such as her extreme sensitivity to rejection. Kan pointed to what he called the “highly contingent” nature of the suicide attempt, i.e., that Woo would not have tried to kill the children if Embry “had taken her back or had tried to stop her.” In Kan’s experience, MDD could not typically be alleviated by renewal of a single relationship.

Kan thought that while Woo personally believed that it was morally correct to kill her children, she understood that the killing would violate “generally accepted standards of moral wrongfulness.” Support for this conclusion included her suicide note to Embry, where she wrote: “I know the pain and awfulness this will cause everyone, especially Gavin and my mother. I am very sorry for that. I really do feel like I cannot go on with this life. It is completely selfish, I know.”

### **C. Jury Instructions on the Insanity Defense**

Prior to trial, both sides proposed jury instructions that included the CALCRIM No. 3450 instruction on the insanity defense, which, at the time, stated in relevant part: “The defendant was legally insane if: 1. When she committed the crimes, she had a mental disease or defect; and 2. Because of that disease or defect, she did not know or understand the nature and quality of her act or did not know or understand that her act was morally or legally wrong.” (CALCRIM No. 3450 (Spring 2008 ed.).)<sup>2</sup> The court furnished this instruction to the jury at the outset of the sanity phase of the trial.

When the insanity defense instructions were initially discussed, the prosecution requested that CALCRIM No. 3450 be supplemented with the following special instruction: “ ‘Morally wrong’ as used in this instruction means the violation of generally accepted moral standards and not those standards peculiar to the accused.” The prosecution also suggested that the CALJIC No. 4.00 instruction on the insanity defense

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<sup>2</sup> The current version of the instruction states: “The defendant was legally insane if: 1. When she committed the crimes, she had a mental disease or defect; and 2. Because of that disease or defect, she was *incapable* of knowing or understanding the nature and quality of her act or was *incapable* of knowing or understanding that her act was morally or legally wrong.” (CALCRIM No. 3450 (2011 ed.), italics added.)

might be more “accurate/complete” than CALCRIM No. 3450. The defense argued that CALCRIM No. 3450 required no elaboration and objected to the prosecution’s special instruction. The defense filed proposed special instructions to be furnished if the prosecution’s special instruction was given.

When the court and the parties subsequently conferred on the instructions, the defense objected to CALJIC No. 4.00, and contended that CALCRIM No. 3450 should be given without further special instructions. The court indicated that it was inclined to furnish CALJIC No. 4.00 supplemented with additional language rather than CALCRIM No. 3450. The court said it was continuing to work on the issues and invited the parties to submit further instructions they believed were appropriate.

The parties submitted emails to the court setting forth their positions. The prosecution proposed a special instruction stating: “For the purposes of this instruction, morality is not simply the individual’s belief on what conduct is or is not good. It requires a sincerely held belief grounded on generally accepted ethical or moral principles derived from an external source. Moral obligation in the context of the insanity defense means generally accepted moral standards and not those standards set by the Court.”

The defense proposed the following special instruction: “The wrong contemplated by the two-part sanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that her act is criminal and legally wrong but does not think it is morally wrong, she may still be criminally insane. The morality referred to in this instruction requires a sincerely held belief grounded in generally accepted ethical or moral principles. Analysis of whether a defendant knew an act was morally right or wrong or the sanity determination focuses on the defendant’s beliefs and motivations for committing the act not by [*sic*, presumably, the act] itself. [¶] The acts of murder and attempted murder are recognized as not being generally accepted moral acts, however, it is the beliefs and motivations of the defendant as to why she committed the acts that must accord with generally accepted moral standards and it (*sic*) must be considered as to whether a defendant considers her act to be morally wrong. [¶] Moral obligation in the

context of the insanity defense means generally accepted moral standards and not individual standards set by the defendant.”

The court decided to instruct the jury pursuant to CALJIC No. 4.00 as follows: “A person is legally insane when by reason of mental disease or defect, she was incapable at the time of the commission of the crime of one of the following: 1. Knowing the nature and quality of her act; or 2. Understanding the nature and quality of her act; or 3. Distinguishing what is legally right from what is legally wrong; or 4. Distinguishing what is morally right from what is morally wrong.” The court gave the following additional instruction, which appears in CALJIC No. 4.00 in brackets: “Conduct that is morally wrong is conduct that violates generally accepted standards of moral obligation. Legal wrongfulness and moral wrongfulness are often equivalent but that is not always the case.” The court also furnished the following special instruction: “The wrong contemplated by the two-part insanity test refers to both the legal wrong and moral wrong. [¶] Moral obligation in the context of the insanity defense means generally accepted moral standards and not those standards peculiar to the defendant. [¶] The morality referred to in this instruction requires a sincerely held belief grounded in generally accepted ethical or moral principles derived from an external source.”

## **II. DISCUSSION**

Woo contends that the instructions on the insanity defense were flawed in various respects, all of which relate to her subjective awareness that her acts were morally wrong. The arguments concern both instructions the court decided to furnish and those it declined to give.

Woo argues that CALCRIM No. 3450 should have been furnished instead of CALJIC No. 4.00 because the CALCRIM instruction refers to an incapacity to “know[] or understand[]” that an act is morally wrong, while the CALJIC instruction refers an incapacity to “distinguish[]” moral right from wrong. Woo maintains that “understanding” as used in CALCRIM connotes a deeper appreciation than “knowing,” and an ability to distinguish between right and wrong as used in CALJIC signifies merely a capacity to know, and not necessarily a capacity to understand, that an act is morally

wrong. Woo submits that an instruction requiring that a defendant understand as well as know an act is immoral is mandated by *People v. Skinner* (1985) 39 Cal.3d 765 (*Skinner*).

The defendant in *Skinner* murdered his wife under a “delusional” belief that “[t]he act [was] not wrongful,” and “the killing [was] with complete moral and criminal impunity” because it was “sanctified by the will and desire of God.” (*Skinner, supra*, 39 Cal.3d at p. 770.) The trial court found that the “defendant met one, but not both, prongs of the M’Naghten test. Defendant knew the nature and quality of his act. He knew that his act was homicidal. He was unable to distinguish right and wrong, however, in that he did not know that this particular killing was wrongful or criminal.” (*Ibid.*) The *Skinner* court construed Penal Code section 25, subdivision (b),<sup>3</sup> to require a finding of insanity if either prong of the M’Naghten test is satisfied. The court also rejected the People’s argument that “under the California version of the M’Naghten test a defendant who could comprehend that his act was unlawful could not be legally insane.” (*Id.* at p. 778.) In the course of rejecting that argument, the court observed that “the California version of the M’Naghten test ha[s] been liberalized by holding that ‘knowing’ in the sense of being able to verbalize the concepts of right and wrong was insufficient to establish legal sanity. Rather, the defendant must ‘know’ in a broader sense – he must appreciate or understand these concepts.” (*Id.* at p. 779.)

Subsequent cases confirm that CALJIC’s language, “which essentially tracks the language of section 25, subdivision (b), ‘correctly and adequately explain[s] the applicable law to the jury.’ ” (*People v. Jablonski* (2006) 37 Cal.4th 774, 831 (*Jablonski*), quoting *People v. Kelly* (1992) 1 Cal.4th 495, 535 (*Kelly*).) In *Kelly*, the court rejected an argument that the words “distinguishing right from wrong” in section

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<sup>3</sup> This statute provides: “In any criminal proceeding . . . in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong at the time of the commission of the offense.” (Pen. Code § 25, subd. (b), *italics added*.) *Skinner* held that the italicized word “and” should be read as “or.” (*Skinner, supra*, 39 Cal.3d at p. 769.) Further statutory references are to the Penal Code.



25, subdivision (b) were “too vague.” (*Kelly*, *supra*, 1 Cal.4th at pp. 534-535.) *Kelly*’s discussion shows that the distinction proffered by Woo between an inability to distinguish what is right from what is wrong, and an inability to know or understand what is wrong, lacks substance. They are synonymous formulations of the same issue: “The relevant inquiry regarding sanity is whether the defendant was incapable of distinguishing right from wrong, that is, of realizing that his crimes were morally wrong.” (*Id.* at p. 535; italics omitted.) Thus, a prior version of CALJIC No. 4.00 stating that “[a] person is legally insane when by reason of mental disease or defect he was . . . incapable of distinguishing right from wrong at the time of the commission of the offense” was “correct[] and adequate[.]” (*Ibid.*) *Skinner* does not compel a contrary conclusion. *People v. Coddington* (2000) 23 Cal.4th 529, 608 considered the same instructions as those we have quoted from *Kelly* and determined “the jury was properly instructed in accordance with section 25, subdivision (b), and *People v. Skinner*, *supra*, 39 Cal.3d 765.”<sup>4</sup>

Therefore, CALJIC No. 4.00 is not deficient as Woo claims, and the court did not err in giving it rather than CALCRIM No. 3450. Moreover, we see no reasonable prospect that Woo could have persuaded the jury with an argument that while she “knew” that killing her children was morally wrong, she did not “understand” that killing them was morally wrong. Woo was not prejudiced by the failure to give an instruction that would have supported that argument.

In oral argument on appeal, Woo assailed CALJIC No. 4.00 from a different angle. She essentially reiterated an argument in *Jablonski*, *supra*, 37 Cal.4th at page 831, that CALJIC No. 4.00 erroneously refers to a broad, “general incapacity” to distinguish between right and wrong, rather than a narrower, “specific incapacity to distinguish right from wrong in relation to the crime.” However, CALJIC No.4.00 states that the inability to distinguish right from wrong must exist “at the time of the commission of the crime,” a requirement reiterated in instructions that were given in *Jablonski* in addition to CALJIC

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<sup>4</sup> *Coddington* was overruled on a different point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, footnote 13.

No. 4.00. The jury was told: “ ‘You may consider evidence of [defendant’s] mental condition before, during, and after the time of the commission of the crime as tending to show the defendant’s mental condition *at the time the crime was committed.*’ . . . ‘If *during the commission of the crime* the defendant was incapable of understanding that his act was morally wrong or incapable of understanding that that his act was unlawful, then he is not criminally liable.’ ” (*Ibid.* [italics original].) Those additional instructions obviated the need to reach the merits of Jablonski’s argument. “Even if we assume that defendant’s strained reading of CALJIC No. 4.00 is plausible,” the court wrote, “any ambiguity in that instruction is resolved when it is considered in context of these further instructions because they clearly focus the jury’s attention on defendant’s capacity to distinguish right from wrong at the time of the commission of the crimes.” (*Id.* at pp. 831-832.) *Jablonski* thus did not endorse the “strained reading” of CALJIC No. 4.00 advanced by Woo at oral argument. To the contrary, CALJIC No. 4.00 properly focuses the jury’s attention on the defendant’s state of mind at the time of the criminal act.

Woo also alleges error because the court instructed the jury that “[t]he wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong.” This language appears to be taken from the notes to CALCRIM No. 3450, under the heading “Related Issues.” The authorities cited for the proposition are *Skinner*, *supra*, 39 Cal.3d at pp. 777-784, and *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271-1274 (*Stress*), which held that a defendant must realize that an act is morally, as well as legally, wrong, in order to be found sane. The reference in this instruction to a “two-part test” harkens back to *Skinner*, which initially described M’Naghten as having two prongs (*Skinner*, *supra*, 39 Cal.3d at pp. 769-770), but then added a third in its discussion distinguishing legal wrong from moral wrong (*id.* at pp. 777-784). Woo maintains that this instruction was “fundamentally confusing” because the court read to the jury a four-part test for insanity under CALJIC No. 4.00, and the instruction “misled jurors into believing that the two [legal and moral wrong] should effectively be treated as the same.”

Aside from the fact that Woo herself included the challenged language in her proposed special instructions, these arguments lack merit. The record demonstrates the

jury would have known that the sole contested issue was Woo's ability to appreciate that killing her children was morally wrong. Her experts and her counsel conceded that she understood that killing them was illegal. Nothing in counsels' arguments or the court's instructions lead us to conclude that the jury would have thought these two issues were the same. Contrary to Woo's claim, the instructions here were different from those in *People v. Torres* (2005) 127 Cal.App.4th 1391, 1400, which required the defendant to prove his inability to distinguish both legal and moral right from wrong. The version of CALJIC No. 4.00 given in this case clearly stated that an incapacity to distinguish moral right from wrong would be enough to support a finding of insanity.

Woo next challenges the bracketed language in CALJIC No. 4.00, included in the court's instruction, stating that: "Legal wrongfulness and moral wrongfulness are often equivalent but that is not always the case." Woo contends this language "erroneously suggested an identity between legal wrong and moral wrong," but a plain reading of its terms draws a limited distinction between the two. The instruction is supported by *Skinner*, which quoted with approval reasoning from Justice Cardozo's opinion in *People v. Schmidt* (N.Y. 1915) 110 N.E. 945, 949-950: " 'Knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals.' " The instruction was lifted from *Stress, supra*, 205 Cal.App.3d at p. 1275, and it is not erroneous.

Woo next challenges the court's failure to give her proposed special instructions stating: "Analysis of whether a defendant knew an act was morally right or wrong [f]or the sanity determination focuses on the defendant's beliefs and motivations for committing the act not [the act] by itself. [¶] The acts of murder and attempted murder are recognized as not being generally accepted moral acts, however, it is the beliefs and motivations of the defendant as to why she committed the acts that must accord with generally accepted moral standards and [that] must be considered as to whether a defendant considers her act to be morally wrong." The court thought that "motive

certainly is something that the jury is entitled to keep in mind,” but rejected these instructions as argumentative.

Woo contends that this special instruction is appropriate based upon the passage in *Kelly* where the court wrote that “[t]he relevant inquiry regarding sanity is whether the defendant was *incapable* of distinguishing right from wrong, that is, of realizing that his crimes were morally wrong.” (*Kelly, supra*, 1 Cal.4th at p. 535.) But before making this observation the *Kelly* court noted, with respect to the charges in that case: “Murder, rape and robbery are wrong morally as well as legally. That is not and never was at issue at the sanity phase.” (*Id.* at pp. 534-535.) Here, as in *Kelly*, whether murder was immoral as well as illegal was not at issue. *Kelly* does not warrant delivery of this special instruction. The issue in the sanity phase here was Woo’s state of mind, not the morality of her acts. The jury did not need to be told that murder and attempted murder are generally regarded as immoral because that point was never in question.

As *Kelly* makes clear, the inquiry with respect to a defendant’s state of mind is whether he or she was capable of realizing that his or her acts were morally wrong. A defendant’s motives may be relevant to that inquiry, but their degree of relevance depends on the facts of the particular case, and they are not the ultimate issue. In *Skinner*, for example, the defendant’s motives, if believed, were sufficiently delusional to virtually compel an inference that he was unable to distinguish moral right from wrong. In contrast, the sanity phase evidence in *Kelly* focused on the defendant’s “borderline” intellect and possible brain damage, and motivations for the crimes were not material. (*Kelly, supra*, 1 Cal.4th at pp. 514-515.) Stating that “whether a defendant knew an act was morally right or wrong . . . focuses on the defendant’s beliefs and motivations for committing the act,” erroneously emphasizing the significance a defendant’s motives have in all cases.

Woo understandably wanted the jury to focus on her professed motive for killing her children because the belief expressed in her suicide notes that she had to kill them to protect them was the centerpiece of her insanity defense. But the jury was not required to discount other statements in those notes – “people will think I’m a monster,” “I know I

am being selfish,” and “I don’t deserve [forgiveness]” – which suggested her realization that what she was doing was morally wrong. Woo’s instruction was thus properly rejected as argumentative as well as incorrect. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135 [an instruction is argumentative if “it would invite the jury to draw inferences favorable to the defendant from specified items of evidence on a disputed question of fact”]; *People v. Hughes* (2002) 27 Cal.4th 287, 361 [same].) The weight to be given Woo’s motives was a matter for argument to the jury. (*People v. Wright, supra*, 45 Cal.3d at p. 1135.)

Woo contends that the court should have given another proposed instruction that stated: “If the defendant appreciates that her act is criminal and legally wrong, but does not think it is morally wrong, she may still be criminally insane.” This language, like the instruction quoted above on the “the two-part insanity test,” appears under “Related Issues” in the notes after the text of CALCRIM No. 3450, and is based on *Skinner, supra*, 39 Cal.3d at pp. 777-784, and *Stress, supra*, 205 Cal.App.3d at pp. 1271-1274. The point, again, is that a defendant who understands that his or her conduct is illegal may be found insane depending upon his or her ability to distinguish moral right from wrong. This point was covered in the CALJIC 4.00 instruction, which listed the defendant’s inability to distinguish legal right from wrong, and inability to distinguish moral right from wrong, as separate grounds for a finding of insanity. (*People v. Moon* (2005) 37 Cal.4th 1, 30 [duplicative instructions are properly refused].)

Woo’s broader argument – that the instructions as a whole “favor[ed] the prosecution’s position” – is as unpersuasive as her assignments of error with respect to particular instructions. Woo writes: “Taken as a whole, the trial court’s instructions prejudicially misled jurors for two fundamental reasons: *first*, they elided the key distinction between the capacities to understand that an act is morally wrong as opposed to understanding that it is legally wrong; and *second*, to the extent that the instructions placed the capacity to understand moral wrong in issue, they erroneously suggested a person must be deemed sane if she simply knew that others might disapprove of her conduct . . . .” We have already disposed of the first of these assertions. The jury would

have well understood from the instructions, evidence, and arguments that the issue in this case was Woo's capacity to distinguish moral, not legal, right from wrong. The prosecutor acknowledged in closing argument that "[t]here are 'or's' between each one of these elements [in the CALJIC No. 4.00 four-part test] because any one of them independently can serve as a basis of insanity."

The second assertion misleadingly singles out the prosecution argument that Woo could be found sane solely by virtue of her realization that people would think she was a "monster." The prosecutor argued that Woo "knew that killing her children was morally wrong, that society would condemn that act," and maintained that Woo could distinguish moral right from wrong because "[s]he is afraid that . . . her situation will not be appreciated for what it is . . . ." According to Woo, the prosecution thus "effectively and inaccurately told jurors that [she] should be viewed as sane so long as, *inter alia*, she 'knew' that others would disapprove of her conduct . . . ." But Woo's repeated attacks on this argument are unavailing because the court's instructions did not endorse it. Moreover, Woo countered the argument with evidence that she believed others would have done what she did had they been in her shoes, and with the observation that she did not "say[] she [was] a monster," only that people would perceive her as one. In view of Woo's rebuttal, it is questionable whether the prosecution's argument based on the "monster" reference in the suicide notes was "effective" as Woo claims. The jury was more likely persuaded by other statements in the notes that Woo did not believe she deserved to be forgiven, and recognized that her actions stemmed from a "selfish" decision to end her life.

The court sought to furnish instructions that enabled the parties to argue their positions, and commendably achieved its goal. The prosecutor minimized Woo's professed motive and emphasized the ultimate issue, stating: "Just because [Woo], according to the defense, said she saw in her own mind what she thought was the right thing to do, that is not insanity. Insanity is this instruction: The capability of distinguishing between moral right and wrong." Defense counsel criticized the prosecutor in rebuttal for ignoring the motive evidence, and the instruction that

“morality . . . requires a sincerely held belief grounded in generally accepted moral or ethical principles derived from an external source.” This instruction gave Woo’s motive all the weight it deserved, and all the room she needed to argue that she was insane because she truly believed that she was protecting her children by killing them.

### **III. DISPOSITION**

The judgment is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Pollak, J.